LIBRARY
SUPREME COURT

Office-Supreme Court, U.S.
FILED
JUL 31 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

..... TERM, 1964.

No. 337

WARREN J. MOITY,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana.

JURISDICTIONAL STATEMENT.

BENTLEY G. BYRNES,
408 Maryland Casualty Building,
New Orleans, Louisiana 70112,
Attorney for Appellant

EMILE A. CARMOUCHE,
Of Counsel.

INDEX.

	Page
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	3
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	6
The Facts	6
Presentation of the Federal Question	9
THE QUESTIONS ARE SUBSTANTIAL AND IMPORTANT	10
CONCLUSION	16
APPENDIX A: Opinion and Judgment of the Supreme Court of Louisiana	17
APPENDIX B: Opinion of the Sixteenth Judicial District Court for the Parish of Iberia	32

TABLE OF AUTHORITIES.

Page

Cases:

Chaplinsky vs. New Hampshire, 315 US 568 (1942) 3

Dahnke-Walker Co. vs. Bondurant, 257 US 282 (1921) 3

DeJonge vs. Oregon, 299 US 353 (1937) 3

Wood vs. Georgia, 370 US 375 (1962) 14

New York Times Co. vs. Sullivan, (Decided March 9, 1964) U. S. Supreme Court Reports, ... Law Ed. 14, 15, 16

Jim Garrison vs. State of Louisiana, bearing Docket No. 400 of this Court, October Term. 1963, (Pending) 2

Statutes:

Constitution of the United States:

First Amendment 1, 5, 6, 9, 10, 11, 12, 15

Fourteenth Amendment 1, 5, 6, 9, 10, 11

La. R.S. 14:47 ..... 2, 3, 5, 6, 7, 8, 9, 10, 11

La. R.S. 14:48 3

La. R.S. 14:49 3

28 USC 1257(2) 3, 16

28 USC 1257(3) 3, 16

28 USC 2103 16

Other:

Cooley Constitutional Limitations, (8th Ed., 1927) 14

SUPREME COURT OF THE UNITED STATES.

..... TERM, 1964.

No. .....

WARREN J. MOITY,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana.

JURISDICTIONAL STATEMENT.

Appellant submits this statement to show that the instant appeal is within this Court's jurisdiction, in that the validity of the Louisiana statutory provision, defining and fixing penalties for the crime of defamation, were brought in question in the State Supreme Court on the ground of it's being repugnant to the First and Fourteenth Amendments to the Constitution of the United States, and the decision of that Court was ex-

pressly in favor of its validity and held that the First and Fourteenth Amendments were not applicable.

In connection with the above, may we invite this Court's attention to the fact, and respectfully emphasize, that the main constitutional question involved herein is presently before this Court, for decision, in the case entitled *Jim Garrison v. State of Louisiana*, bearing Docket No. 400, October 1963 Term, of this Court.

OPINIONS BELOW.

The opinion of the Supreme Court of Louisiana is reported in Volume 159, So.2d, at page 149. The opinion of the Sixteenth Judicial District Court for the Parish of Iberia, the court of first instance, has not been reported. Both opinions are printed in the Appendices, at pages 17 and 32, respectively, *infra*.

JURISDICTION.

This is a criminal prosecution for defamation, brought against appellant pursuant to Section 47 of Title 14 of the Louisiana Revised Statutes.

The judgment of the Supreme Court of Louisiana was rendered on December 16, 1963, (R. 176-186). Rehearing was denied, and the judgment became final and executory, on January 20, 1964, (R. 187-190). The notice of appeal to this Court was filed in the Supreme Court of Louisiana on April 17, 1964, (R. 191-193). Application to enlarge time for docketing appeal in the United States Supreme Court was filed in and granted by the

Supreme Court of the State of Louisiana on August 15th, 1964.

This Court has jurisdiction of the appeal under 28 USC 1257(2). *Chaplinsky v. New Hampshire*, 315 US 568 (1942); *DeJonge v. Oregon*, 299 US 353 (1937); *Dahnke-Walker Co. v. Bondurant*, 257 US 282 (1921). Should this appeal be held not to fall within this Court's jurisdiction under 28 USC 1257(2), this Court has certiorari jurisdiction under 28 USC 1257(3) and 28 USC 2103.

STATUTES INVOLVED.

The appeal involves the validity, under the First and Fourteenth Amendments to the Constitution of the United States, of the following Louisiana statutory provisions as applied to appellant under the particular facts of this case:

1. Louisiana Revised Statutes, Title 14, Sections 47, 48 and 49, 9 West's Louisiana Statutes Annotated—Revised Statutes, 280:

"Section 47. Defamation

"Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

"(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

"(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

"(3) To injure any person, corporation, or association of persons in his or their business or occupation.

"Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both."

"Section 48. Presumption of Malice

"Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

"Where such a publication or expression is true, actual malice must be proved in order to convict the offender."

"Section 49. Qualified Privilege

"A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

"(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

"(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

"(a) The conduct of a person in respect to public affairs; or

"(b) A thing which the proprietor thereof offers or explains to the public.

"(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

"(4) Where the publication or expression is made by an attorney or party in a judicial proceeding."

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

1. Whether it is a violation of the First Amendment of the United States Constitution, prohibiting the abridgment of freedom of speech, which said amendment is made applicable to the citizens of the States, through the Due Process Clause of the Fourteenth Amendment of the United States Constitution, to hold that the statement set forth in the Bill of Information, attributed to appellant herein, Warren J. Moity, is a violation of Louisiana Revised Statutes 14:47, defining the crime of defamation, or to interpret the said Louisiana Revised Statutes 14:47 so as to include within the scope thereof the statement set forth in such Bill of Information.

2. Whether it is a violation of the First Amendment of the United States Constitution, prohibiting the abridgment of freedom of speech, which said amendment is made applicable to the citizens of the States, through the Due Process Clause of the Fourteenth Amendment of the United States Constitution, to hold that appellant herein, Warren J. Moity, was and is guilty of a violation of Louisiana Revised Statutes 14:47, *supra*, or of any unlawful act whatsoever, by virtue of the statement attributed to him in and by the Bill of Information forming the basis of his prosecution in the District Court, or under the facts, circumstances and proof adduced at the trial of this case in the District Court, when such statements forming the basis of his prosecution in the District Court was an allegation made by said appellant, Warren J. Moity, on information and belief, in a petition filed in the Supreme Court of the State of Louisiana, by said appellant, said allegation being contained in and forming a part of said petition.

STATEMENT OF THE CASE.

The Facts.

Warren J. Moity, who is not a member of the legal profession, filed, in *propria persona*, a petition in the Supreme Court of the State of Louisiana on August 24, 1962, praying for a public hearing and that all elected and public officials found guilty of election fraud, coercion, misuse of public money, brutality of citizens, or any lawless act, be held criminally responsible for such

act and sentenced by the Court according to law, and that all officials found guilty of malfeasance, nonfeasance, or any other violation of public trust, be removed from office, and particularly that a Democratic Primary Election, held in July 1962, in Ward Six, be declared null and void and that another election be called.

Moity's petition filed in the Louisiana Supreme Court, seeking the relief hereinabove indicated, contained some 106 articles, one of which said articles, Article 39, was the basis of the criminal charge brought against him (under the provisions of Title 14, Section 47, 9 West Louisiana Statutes Annotated—Revised Statutes, 280) for which he was convicted and sentenced to pay a fine of One Thousand Dollars with costs and in default of the payment of the fine and costs to serve sixty days in the parish jail. The said Article 39 reads as follows:

> "Petitioner is informed, believes and therefore upon such information and belief, alleges, that one Edward Adams, P.M.B. 53003, a colored male, was illegally committed to the Louisiana State Penitentiary on perjured testimony, known to the Sheriff, Gerard Wattigny, and to the District Attorney, Knowles M. Tucker, from the Sixteenth Judicial District Court in and for the Parish of Iberia."

The information upon which Moity was prosecuted, convicted and sentenced, alleged that he, ". . . did defame Knowles M. Tucker by unlawfully and maliciously publishing and expressing in writing to persons other than the party defamed, the following statement,

> "That one Edward Adams, R.M.B. 53003, a colored male, was illegally committed to the Louisiana State Penitentiary on perjured testimony, known to Sheriff Gerard Wattigny and the District Attorney Knowles M. Tucker from the 16th Judicial District, in and for the Parish of Iberia,

which statement tends to expose said Knowles M. Tucker to hatred, contempt and ridicule and to deprive him of the benefit of public confidence and to injure him in his business and occupation, in violation of La. R.S. 14:47: DEFAMATION. Contrary to the form of the Statutes of the State of Louisiana, in such case made and provided and against the peace and dignity of the same." (R. 7-8.)

Moity appealed his conviction and sentence to the Louisiana Supreme Court, which affirmed the actions of the trial court.

Edward Adams had been charged with simple burglary, and had pleaded guilty to the charge. However, according to testimony of record, his mother, Gladys Alexander, went to Moity one month after he had pleaded guilty and complained that he had been convicted on perjured testimony, and requested Moity's assistance, (R. 128, 129, 131 & 139); and, shortly after Adams had been admitted to Angola, the Louisiana State Penitentiary, he wrote to Moity insisting he was not guilty, and related to him the circumstances surrounding the plea of not guilty he had allegedly consented to without benefit of legal counsel, (R. 110, 145). Adams wrote to Moity on several occasions thereafter

and Moity personally conferred with him at Angola concerning his claims. (R. 153,) The substance of the testimony concerning the information given to Moity by Adams and his mother, we respectfully submit, is succinctly expressed in the testimony of the mother when she stated, ". . . Well, they knew he was not guilty! They told him to say he was guilty and they made him perjure his own self . . . ." (R. 131.)

Presentation of Federal Question.

By Demurrer and Motion to Quash (R. 15), the Bill of Exception taken to the ruling of the Court denying the same (R. 24), the Motion for a New Trial (R. 29), and the Bill of Exception taken to the Court's denial of the same—all concern and are applicable to the contention urged herein by appellant, Warren J. Moity, that to hold the statement attributed to him, in the Bill of Information, upon which he was prosecuted and convicted, to be a violation of Title 14, Section 47 of the Louisiana Revised Statutes, *supra*, or to interpret said statute so as to include such statement as being within the scope thereof, would be, and is, in violation of the provisions of the First Amendment of the Constitution of the United States prohibiting the abridgment of freedom of speech as the said amendment is made applicable to the State of Louisiana through the Fourteenth Amendment of the United States Constitution; and, furthermore, that appellant's conviction, under the facts of this case, is in violation of the Due Process Clause of said Fourteenth Amendment, *supra*.

THE QUESTIONS ARE SUBSTANTIAL AND IMPORTANT.

The federal questions raised in this case present constitutional issues which are significantly important not only as a matter of law but also as a matter of public policy.

These issues, in the main, are:

(1) Whether, despite the constitutional guarantee of freedom of speech under the First and Fourteenth Amendments, a State may apply its criminal libel law so as to lawfully convict and sentence a citizen for publication of the statement attributed to the appellant in this case—when such statement was made, together with other statements, in a legal proceeding filed by appellant in the Louisiana Supreme Court in an effort and for the purpose of inducing said tribunal to investigate and take such judicial action as would be proper, concerning sundry alleged violations of law, involving the conduct of public officials, which were therein complained of and which were of grave public concern, even though said Court declined jurisdiction in the premises.

(2) Whether, *per se* and as a matter of law, the statement attributed to appellant is defamatory or violative of Title 14, Section 47 of the Louisiana Revised Statutes, *supra;* and, whether appellant's conviction, under the facts and circumstances disclosed in the record, is violative of his rights under the Due Process Clause of the Fourteenth Amendment.

The Court's attention is invited to the following facts, circumstances and conclusions which are respectfully

submitted as being of appreciable importance insofar as the issues herein involved are concerned.

(1) The allegedly defamatory statement attributed to appellant, to-wit:

> "That one Edward Adams, P.M.B. 53003, a colored male, was illegally committed to the Louisiana State Penitentiary on perjured testimony, known to Sheriff Gerard Wattigny and the District Attorney Knowles M. Tucker, from the 16th Judicial District, in the Parish of Iberia",

is not such a statement as may be properly construed as being defamatory *per se*, or such as would expose said Sheriff or District Attorney to hatred, contempt, or ridicule, or deprive them of the benefit of public confidence or social intercourse, in violation of the provisions of Title 14, Section 47 of the Louisiana Revised Statutes, *supra*; nor can such statement be construed as one which may properly be repressed without violation of the First and Fourteenth Amendments of the Constitution. The statement does not impute to the Sheriff and District Attorney any responsibility for the perjured testimony, nor can it be construed as necessarily charging that such perjury was known to said officials at the time of its commission. To state that a person was illegally committed to the penitentiary on perjured testimony can be properly construed as meaning only that such a commitment was the result of such testimony. And to assert that an official knew the testimony was false, and *a fortiori* knew that the conviction and commitment was illegal, does not, logically or legally, necessarily impute to such official the responsi-

bility for its falseness or accuse the official with having knowledge of its falseness at the time such testimony was given. It may very well be construed that the official learned or had knowledge of the falsenss of the testimony, and of the illegality of the commitment, *after* the conviction and commitment of the accused.

The foregoing concerns the question as to whether the allegedly defamatory statement may be properly considered to be one which, under the law, is defamatory *per se*. Whether such statement, critical of the conduct of a public official, may properly be repressed, under the circumstances prevailing in this case, without violation of the freedom of speech as guaranteed by the First Amendment of the Constitution, is more fully presented and discussed hereinafter.

(2) Appellant is a lay person who is not versed in legal technicalities or procedures. He was sought out by the mother of Edward Adams (and by the said Adams himself) who informed him that, ". . . They made him perjure his own self . . . ." The circumstances as related to appellant by this mother and son, who sought his help, impressed him and impelled him to feel justified and required to present their contentions, and claimed grievances, to the Louisiana Supreme Court. That the petition filed by appellant in the said Court, for the purpose of having it investigate and pudicially act on said claims, together with other claims of lawlessness, was not the proper legal vehicle or procedure technically required for the obtaining of such relief, does not detract from the fact that the obvious reason and purpose of the same was

to obtain proper legal redress and/or relief. Appellant intended and attempted to act within the law, in the manner he considered proper. He sought legal redress and/or relief from and in a court of law—even though such Court declined to hear his cause.

(3) Of significant importance, we respectfully submit, is the so-called KVIM-EDITORIAL, filed as evidence in the record of this case by the State of Louisiana, which took cognizance of the fact, among other things, that, in his petition to the Louisiana Supreme Court, appellant alleged that crime and lawlessness was being permitted to continue in Iberia Parish; and, that appellant was applying to said Court for relief against such lawlessness by public officials of the parish. Furthermore, of equal importance is the observation made in said editorial that, "After carefully reviewing the evidence presented to the Supreme Court, we feel that there is sufficient reason to warrant an unbiased investigation, to either prove or disprove these charges." (R. 56.) Under such circumstances, and in the face of the facts heretofore disclosed as having been related to appellant, can it properly be held that appellant acted with actual malice and beyond the constitutional rights contemplated and afforded and guaranteed to every citizen, under and by the First and Fourteenth Amendments?

(4) It is axiomatic, that in considering the rights and duties of a citizen of any particular community to comment upon the affairs and actions of their public officials in their official capacity and to supply the public need for information and education with respect

to the significant problems of the time, a broad conception of the First Amendment to the United States Constitution is necessary. In *Wood v. Georgia*, 370 U.S. 375, 82 S. Court, 1364, 8 L.Ed. Second, 569, this Court stated:

> "Men are entitled to speak as they please in matters vital to them; errors in judgment or unsubstantiated opinion may be exposed but not through punishment for expression. Under our system of government, counter argument and education are the weapons available to expose these matters, not the abridgment of the right of free speech."

Has any citizen a lesser right to attempt to seek recourse in the Courts of this nation; to present to such Courts, for investigation and judicial action, matters of grave public concern, involving the conduct of public officials, which they deem should be considered, resolved and determined in and by a Court of law—and also bring the same to the attention of a vitally interested citizenry? Cooley Constitutional Limitations, Volume 2, p. 885 (8th Ed. 1927).

(4) Most of the issues in the case at bar have now been resolved by this Court's decision in the case of the *New York Times Co. vs. Sullivan*, decided March 9 of this year. It was the opinion of the Court in said case that prior statements (in *Beauharnais v. Illinois*, and other cases), "to the effect that the Constitution does not protect libelous publications," do not foreclose inquiry into cases which might involve "the use of libel laws to impose sanctions upon expressions critical of

official conduct of public officials," and that, like "the various other formulae for repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations," but must also "be measured by standards that satisfy the First Amendment."

This Court, in the *Times* case, expressly reaffirmed its prior holdings that this rule is especially applicable to judges, who "are to be treated as men of fortitude, able to thrive in a hardy climate," in its holding "that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge . . . even though the utterance contains 'half-truths' and 'misinformation', since such repression can be justified, if at all, only be a clear and present danger of the obstruction of justice." Can it be, therefore, correctly said, much less judicially concluded, that such rule is less applicable, or not applicable at all, simply because the official conduct of a sheriff or district attorney (instead of that of a judge) is involved or brought into question, as a result of the institution of judicial proceedings, by a citizen alarmed and concerned by apparent conditions of vice and corruption, who attempts to seek relief and/or redress in a court of law. Furthermore, should or could the fact of such action be repressed without doing violation to the principles underlying the right of free speech, as guaranteed by the First Amendment of the Constitution?

CONCLUSION.

This Court in the *Times* case declared that it will always "make an independent examination of the whole record" and will itself examine "the statements in issue and the circumstances under which they were made," in order to determine "whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protest," and will itself, in proper cases, by its own review of the evidence, "make certain that those principles have been constitutionally applied."

Appellant respectfully submits that an independent examination of the whole record of this case, by this Court, will be sufficient in itself to demonstrate that this case presents serious and substantial questions of Constitutional law, and that this appeal falls within this Court's jurisdiction under 28 USC 1257(2); however, should, for any reason, this case be considered not to fall within the Court's appellate jurisdiction, the issues presented are of such constitutional importance as to justify and require the exercise of this Court's certiorari jurisdiction, which it has the power to do in the basis of the appeal record herein, under 28 USC 1257(3) and 2103.

BENTLEY G. BYRNES,
408 Maryland Casualty Building,
New Orleans, Louisiana 70112,
Attorney for Warren J. Moity,
Appellant.

EMILE A. CARMOUCHE,
P. O. Drawer 605,
Crowley, Louisiana 70526,
Of Counsel for Appellant.

APPENDIX A.

Monday, Dec. 16, 1963.

SUPREME COURT OF LOUISIANA.

No. 46,708.

STATE OF LOUISIANA,

versus

WARREN J. MOITY.

Appeal from the Sixteenth Judicial District, Parish of Iberia, Hon. S. O. Landry, Judge.

FOURNET, Chief Justice.

The defendant, Warren J. Moity, having been charged in a Bill of Information with the defamation of Knowles M. Tucker, district attorney of Iberia Parish, in violation of R. S. 14:47,[1] is appealing from his conviction and sentence thereunder to pay a fine of $1,000 and costs; in default thereof, to serve 60 days in the parish

[1] The pertinent portion of R. S. 14:47 provides that "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends: (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; * * * or injure" him "in his * * * business or occupation." It is further stipulated in this article that "Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both."

jail. For the reversal of this conviction and sentence he relies on errors allegedly committed during the course of the trial to which timely objection was made, these being preserved in five Bills of Exceptions that were duly perfected.

The prosecution is predicated on Article 39 of a 106-paragraph petition filed by Moity in the Louisiana Supreme Court in which he sought a public hearing for the purpose of establishing the violation of public trust by various officials of Iberia Parish, and specifically charged that Tucker had "illegally committed to the Louisiana State Penitentiary on perjured testimony, known to Sheriff Gerard Wattigny and the District Attorney Knowles M. Tucker from the 16th Judicial District, in and for the Parish of Iberia," one Edward Adams, P.M.B. 53003.

In a motion to quash the information the defendant contended it was fatally defective in that it (1) contains no allegations of fact that are defamatory and does not, therefore, charge a crime; (2) is based on a statement attributed to the defendant as having been made in a petition in a legal proceeding and is, therefore, qualifiedly privileged; and (3) is unconstitutional if this statement is violative of R. S. 14:47, defining the crime of defamation and fixing the penalty therefor, or is construed as coming within its scope, for this would abridge the freedom of speech guaranteed by the First Amendment to the Constitution of the United States and the prohibition therein against the passage by Congress of any statute contravening this guaranty,

which prohibition extends to the State of Louisiana through the provisions of the Fourteenth Amendment to the federal constitution. When the trial judge overruled this motion, the first Bill of Exceptions was reserved.

These identical issues were urged in a similar case on appeal here, *State v. Mrs. Douglas Webster*, No. 46,709 on our docket, the decision in which is this day being handed down, and were there adjudicated adversely to the accused. See, also, *State v. Garrison*, 244 La. 787, 154 So. 2d 400, and the authorities therein cited.

There is clearly no merit to the first contention for a mere reference to the information will disclose the defendant was charged, in language tracking the pertinent provisions of R. S. 14:47 as set out above in Footnote No. 1, with having, on or about August 25, 1962, in the Parish of Iberia, "unlawfully and maliciously" published and expressed "in writing to persons other than the party defamed," the above quoted statement from the petition filed by him in our court. To charge a person who is, by law, sworn to prosecute all offenses and crimes occurring within his jurisdiction, as did the defendant in seeking a public hearing in that instance, with having illegally committed a person to the state penitentiary is tantamount to accusing him of malfeasance in office. To further charge this action was taken on testimony known to the prosecutor to be perjured adds to the gravity thereof. It is unquestioned such a statement would tend to expose this public

official to hatred, contempt, and ridicule, as well as to deprive him of the benefit of public confidence, thus injuring him in his business and occupation—not only as a district attorney but also as a lawyer.

The second ground urged as the basis for the motion to quash the information is equally without merit. As pointed out in the case of *State v. Mrs. Douglas Webster*, *supra*, "the fact that the communication was qualifiedly privileged does not of itself render the information ineffective, the state having charged that the alleged libel was uttered maliciously," which, of necessity, presents a matter for determination on the merits.[2]

In disposing of similar charges of unconstitutionality as set out under the third contention, we recognized in the *Garrison* case, *supra*, that under decisions of the United States Supreme Court the freedoms guaranteed individuals under the First Amendment are protested under the Fourteenth Amendment from invasion

[2] In Chapter 5 of the Louisiana Criminal Code, under the heading "Defamation," and following the definition thereof as set out under Article 47, quoted above in Footnote No. 1, follows the next article, which provides that "Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown," whereas if such "publication or expression is true, actual malice must be proved in order to convict the offender." Article 48. Further, "A qualified privilege exists *and actual malice must be proved*, regardless of whether the publication is true or false, in the following situations: (1) Where the publication or expression is a fair and true report of any judicial * * * proceeding * * * (2) Where the publication or expression is a comment made in the reasonable belief of its truth * * * (4) Where the publication or expression is made by an attorney or party in a judicial proceeding." Article 49 of the Louisiana Criminal Code. All of these articles are now incorporated in the Revised Statutes of 1950 as R. S. 14:47, 48, and 49. (The emphasis has been supplied.)

by the states. See, also, *State v. Cox*, ... La. ...., ... So. 2d ...., handed down by this Court November 12, 1963, and being No. 46,818 on our docket.

However, these prohibitions against invasion by the states as set forth in the decisions of the highest court of our country are not so all-inclusive they cover with a protecting blanket any and all statements made or published by individuals or organizations. In the early and celebrated case of *People v. Croswell*, decided in 1804, where the defendant was accused of defaming the then President of the United States, Thomas Jefferson, it was pointed out that "The founders of our governments were too wise and too just ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society." 3 Johnson's cases, at page 337.

The decisions of the states, as well as of the United States Supreme Court and the recognized and renowned commentators on the source and meaning of the provisions of our federal constitution and Bill of Rights, are replete with expressions reflecting that the primary purpose for the guaranty of freedom of speech and the press in the First Amendment was to insure that *previous restraints* upon the publication of beliefs, whether spoken or written, would be prohibited—not

that those disseminating them could do so with impunity and thus go unchallenged if the consequences of such publication unjustifiably damaged others. See, *Patterson v. Colorado*, 205 US 454, 51 L ed 879; *Near v. Minnesota*, 283 US 697, 75 L ed 1357; *Schenck v. US*, 249 US 47, 39 S. Ct. 247, 63 L ed 470; *State v. Van Wye*, 136 Mo. 227, 37 SW 938; *State v. Boyd*, 86 N. J. L. 75, 91 A. 586; *National Labor Relations Board v. Blatt Co.*, 143 F. 2d 268, certiorari denied 65 S. Ct. 135, 323 US 774, 89 L ed 619; *People v. Feiner*, 300 N. Y. 391, 91 NE 2d 316, affirmed 71 S. Ct. 303, 340 US 315, 95 L ed 267; *Times Film Corporation v. City of Chicago*, 139 F. Supp. 837, affirmed 244 F. 2d 432, reversed on other grounds at 78 S. Ct. 515, 355 US 35, 2 L ed 2d 72; *Shively v. Garage Employees Local Union No. 44*, 108 P. 2d 354, 6 Wash. 2d 560; *Baxley v. U. S.*, 134 F. 2d 937; 6 R. C. L. 253, Sections 239-242; 33 Am. Jur. 291, Section 308, et seq., and the authorities therein cited.

To state it succinctly as was done in *State v. Van Wye, supra*, "The laws punishing criminal libel have never been deemed an infringement of this constitutional guaranty." In that decision it was further pointed out that "The constitutional liberty of speech and of the press, as we understand it, simply guaranties the right to freely utter and publish whatever the citizen may desire, and to be protected in so doing, *provided, always, that such publications are not blasphemous, obscene, and scandalous in their character, so that they become an offense against the public, and, by their malice and falsehood, injuriously affect the character, reputation, or pecuniary interests of individuals.*

The constitutional protection shields no one from responsibility for abuse of this right." (The emphasis has been supplied.)

In discussing the purpose of these constitutional privileges as historically conceived and guaranteed, the United States Supreme Court, in *Near v. Minnesota, supra*, pointed out: "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty *to prevent previous restraints upon publication*. The struggle in England (from which country the criminal law of Louisiana is deraigned), directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying *no previous restraints upon publication, and not in freedom from censure for criminal matter when published*. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but *if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.*'" 283 US at pages 713 and 714. (The emphasis and words within brackets have been supplied.)

It is on this theory that statutes of the various states regulating the dissemination of information—both spoken and printed, and pictures as well as words—

have been held to be constitutional, and statutes denouncing libels and defamations as crimes maintained. They are considered as having been enacted under a valid exercise of the police power of the various states and not, therefore, to be an unconstitutional invasion by the states of the freedoms of speech and the press as guaranteed by the First Amendment. The authorities sustaining this view are legion. See, *Adams Newark Theatre Co. v. City of Newark*, 22 N. J. 472, 126 A. 2d 340, affirmed 77 S. Ct. 1395, 354 US 931, 1 L ed 2d 1533, rehearing denied 78 S. Ct. 8, 355 US 851, 2 L ed 61; *People v. Arnold*, 273 P. 2d 711, 127 C. A. 2d Supp. 844; *Taylor v. State*, 194 Miss. 1, 11 So. 2d 663, reversed on other grounds 63 S. Ct. 1200, 319 US 583, 87 L ed 1600; *Gilbert v. Minnesota*, 254 US 325, 41 S. Ct. 125; *State v. Holm*, 139 Minn. 267, 166 N. W. 181, L. R. A. 1918C 304; *State v. McKee*, 73 Conn. 18, 46 A. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124; *Beauharnais v. Illinois*, 343 US 250, 72 S. Ct. 725, 96 L ed 919; *Cantwell v. Conn.*, 310 US 296, 60 S. Ct. 900, 84 L ed 1213, 128 A. L. R. 1352; *Schenck v. U.S.*, 249 US 27, 39 S. Ct. 247, 63 L ed 2d 470, and the authorities therein cited.

A contrary conclusion would not only be unthinkable, but in conflict with other sacred rights guaranteed to the individual. It was never the intention of our founding fathers that each and every person would be allowed to exercise the rights guaranteed by our constitution and Bill of Rights, or any one of them, without restraint or qualification, and in utter disregard of the equal rights of his fellow men; or that one person or class of persons could, by the exercise of a right,

violate the equally important right of another with impunity. They intended, rather, to have these rights recognized and brought under the protection of the law in such a way as to permit man to function as a social being in a society where all rights, privileges, and duties are necessarily relative and mutual, and yet allow him the greatest freedom of action and thought. Thus, although the First Amendment declares, without qualification, that Congress shall make no law "abridging the freedom of speech, or of the press," the courts have consistently maintained that this right to freely express one's opinions upon any subject whatsoever and without prior restraint can only be exercised with impunity so long as it does not infringe the co-existing and co-equal right of man to a good name and fame, which is as essential to his pursuit of happiness as in his right to life, liberty, and the peaceful possession of property. (See the authorities above cited.)

The second error alleged by the defendant to have occurred during the course of his trial is levelled at the ruling of the trial judge permitting the admission in evidence of document No. 46,339 of the Louisiana Supreme Court, despite counsel's objection it had not been identified, the signature thereon of Warren J. Moity, only having been verified by the notary that witnessed his signing of the petition; further, that the offer had been prematurely made.

In overruling the objection to the admission of this document, the trial judge, in his per curiam properly

disposed of the matter thusly: "The alleged defamatory statement of the defendant was made in a petition to the Supreme Court, Mr. Homer J. Hebert, a local Notary Public, had identified his signature and that of the defendant's, to the jurat accompanying the petition. The documents presented bore the certificate of the deputy clerk of the Supreme Court," certifying to the fact that the document was a correct copy of the one lodged in this court. Such legal petitions, when properly certified as being correct by the authorized court official, are admissible without further identification. R. S. 15:457. See, also, R. S. 13:3711 and Articles 251 and 1394 of the CCP.

The objection of prematurity was apparently abandoned for there is no mention of this phase of the objections in the motion for a new trial in the lower court; it is not set out in the assignments of error in this court; and it was not argued here either orally or in brief.

The next error allegedly committed—forming the basis of Bill of Exceptions No. 3—also lacks substance. In this bill counsel contends the trial judge improperly admitted in evidence over his objection judicial proceedings filed by Moity in the district court for Lafayette Parish against a broadcasting company and three individuals, as well as judicial proceedings filed by him against these same three individuals in the United States District Court for the Eastern District of Louisiana, New Orleans division, two of whom were Sheriff Gerard H. Wattigny and District Attorney

Knowles M. Tucker of Iberia Parish,[3] the objection being they were irrelevent and immaterial.

This contention is without merit. As pointed out by the trial judge in his per curiam to this bill, these proceedings, when considered with the petition filed in our court and the other evidence in the record, were admissible to establish that Moity had long borne ill feeling against District Attorney Tucker, and also to show that the statement contained in Article 39 forming the basis of this action had been made by Moity with malice.

The fourth bill, levelled at questions propounded to Edward Adams (the man the district attorney is charged in Article 39 with having knowingly convicted of a crime on perjured testimony) in connection with his incarceration in a jail outside of the Parish of Iberia, where the crime here charged occurred, has apparently been abandoned as it is not included as such in defense motion for a new trial nor in the assignments of error on appeal, and it was not argued in this court.

The last bill was reserved when the trial judge refused to grant the defendant a new trial, the motion therefor being predicated, in addition to the first error above disposed of, on the contention the court erred in finding him guilty since the state failed "*to prove malice and other elements of the crime charged beyond every reasonable doubt.*" (The emphasis has been supplied.)

[3] It is asserted these suits were subsequently dismissed by Moity because he lacked funds with which to prosecute them.

While in this motion defendant contended his guilt had not been proved beyond "every reasonable doubt" (thus obviously conceding there was some evidence establishing his guilt, which would have the effect of removing the matter from our review inasmuch as our jurisdiction, under the provisions of Section 10 of Article VII of the Louisiana Constitution, is limited to questions of law alone), in this court, both orally and in brief, he argues the record *is totally lacking of evidence* to establish (1) the defamation was published in Iberia Parish; (2) the accused acted without probable cause in making the averment in Paragraph No. 39 of the petition for a public hearing, which forms the basis of this charge; and (3) he was actuated by malice.

Our review of the record, including all of the testimony, which was attached to and made a part of this bill, unmistakably reflects there was not only some evidence to sustain the conviction and sentence of Moity, but, as pointed out by the trial judge in his written reasons for judgment and in his per curiam to this bill, it established his guilt beyond all doubt.

The opinion rendered by the trial judge is based upon the applicable statutory law, which is to the effect that for a qualified privilege to exist, requiring the state to prove actual malice motivated the publication of the defamation here involved, it must be (1) "a fair and true report of any judicial • • • proceeding;" (2) predicated upon the "reasonable belief of its truth" if made in connection with the "conduct of a person in respect to public affairs;" and (3) made by a "party in a ju-

dicial proceeding." R. S. 14:49, the pertinent portion of which is quoted above in full in Footnote No. 2.

The published defamation, as found by the trial judge, was not only not a fair and true report, but, in fact, a false statement—one of Moity's own fabrications. He advises that "The State has produced evidence to show that Edward Adams entered a plea of guilty to a charge of simple burglary in this court on March 9, 1960, and that under this plea he was sentenced to nine years in the State Penitentiary. There was no evidence or testimony heard by the court in connection with these proceedings. The state also established that the actual prosecution of Adams was conducted by Mr. Patrick T. Caffery, an Assistant District Attorney, and that Mr. Tucker was attending a Grand Jury Session in the Parish of St. Mary on that day and was not in court."

The judge further found as a fact that Moity's statement could not be privileged or justified as a comment made in the reasonable belief of its truth for the evidence offered by him to establish this was elicited from Edward Adams, his mother, and one Oris Ardoin, who had been jointly charged with Adams, they both pleading guilty and receiving similar sentences. He states: "The substance of the testimony of these witnesses is that the mother told the defendant shortly after her son was sentenced that *the District Attorney had advised her shortly before the sentence to tell her son not to plead guilty if he was not guilty;* that she encountered her son who was being brought to court to plead and *that she so informed him.* The son *nevertheless pleaded*

guilty because he said that he had been promised by *the Sheriff and one of his deputies* that he would receive a suspended sentence if he entered a plea of guilty. The son said that he wrote a letter shortly after he was at Angola to the defendant claiming that he was innocent." (The emphasis has been supplied.)

Clearly this testimony could not form the basis for any reasonable belief on the part of Moity that the charges he made against the district attorney in his petition in this court for a public hearing were true. Moreover, as observed by the trial judge, Moity made no effort to ascertain the truth of these charges in any manner whatsoever. Although he made one or more trips to Angola to speak to Adams and others personally, had the defendant actually been interested in ascertaining the truth about the Adams' conviction, he could have secured this by simply dropping by the office of the clerk of the district court in the courthouse in the town in which he lived, and there have learned with little effort that it was not Tucker who had prosecuted Adams but one of his assistants; further, that no testimony at all had been received at the trial since Adams voluntarily entered a plea of guilty.

In disposing of the contention that this published defamation was privileged because made in a judicial proceeding, the trial judge pointed out that Moity *obviously* filed in the Louisiana Supreme Court (that was clearly without jurisdiction in the matter) the lengthy petition consisting of 106 articles, and in which he recklessly, viciously, and venomously charged

election fraud, collusion in the misuse of public money, brutality of citizens, and lawlessness against various officials of Iberia Parish, both elected and appointed, District Attorney Tucker being one, all for the deliberate purpose of giving it wide publicity. Moity himself, in a certificate appended thereto, asserted he had personally served copies of this petition on some fourteen named individuals, many of whom were residents of Iberia Parish. In addition, the matter received wide publicity throughout the parish through the local radio station, that had been furnished with a copy, and was discussed at length by an organization of local ministers, who were in possession of a copy too. Moity did not, by the mere filing of this petition in our court in Orleans Parish, become privileged to have it published elsewhere. Furthermore, the law does not sanction the publication of false statements maliciously, and all the more particularly when they tend to expose a person to hatred, contempt, and ridicule, as well as deprive him of the benefit of public confidence and injure him in his business or occupation.

For the reasons assigned, the conviction and sentence are affirmed.

APPENDIX B.

REASONS FOR VERDICT—FILED JANUARY 31, 1963.

No. 10,782.

STATE OF LOUISIANA,
versus
WARREN J. MOITY.

16TH. JUDICIAL DISTRICT COURT
PARISH OF IBERIA
STATE OF LOUISIANA

REASONS FOR VERDICT.

The defendant is charged with having on August 25, 1962 defamed KNOWLES M. TUCKER, the District Attorney of the 16th. Judicial District, by maliciously publishing the statement that one EDWARD ADAMS was illegally committed to the Louisiana State Penitentiary on perjured testimony known to Mr. Tucker that the said testimony was perjured.

The State charges further that this statement tends to expose Mr. Tucker to hatred, contempt and ridicule and to deprive him of the benefit of public confidence and to injure him in his business and occupation.

The statute which denounces the crime charged is R.S. 14:47. The charge is in the words of the statute.

The State has shown that this statement was made by the defendant in a petition he filed in proper person in

the Supreme Court of Louisiana on August 24, 1962 and that the allegation which is the subject of this prosecution was contained in Article 39 which recites that:

"Petitioner is informed, believes and therefore upon such information and belief alleges, that one EDWARD ADAMS, PMB 53003, a colored male, was illegally committed to the Louisiana State Penitentiary on perjured testimony, known to Sheriff GERARD WATTIGNY and the District Attorney KNOWLES M. TUCKER from the 16th. Judicial District Court, in and for the Parish of Iberia."

The evidence further shows that a copy of this petition was sent to at least one person in this Parish. He is one of the fourteen persons named in the certificate of the defendant who had been mailed copies of the petition. A copy was also furnished to the local radio station KVIM which gave it considerable radio publicity. It was also furnished to an organization of local ministers, who discussed it at length.

This petition contains 106 articles and petitioner prayed for a public hearing and that all elected or appointed officials found guilty of election fraud, collusion, misuse of public money, brutality of citizens, or any lawless act, be held criminally responsible for such act and sentenced by the Court according to law, and that all officials found guilty of malfeasance, nonfeasance or any other violation of public trust be removed from office, and particularly that a Democratic Primary

election held in July, 1962 in Ward 6 be declared null and void and that another election be called.

The certificate of the Louisiana Supreme Court shows that on September 26, 1962 it denied the application contained in the petition on the grounds that it did not show a justification for the exercise of its original jurisdiction. Under our constitutional provisions, our Supreme Court does not have original jurisdiction in such cases. Its original jurisdiction is limited to the disbarment of lawyers and the removal from office of judges.

On December 17, 1962 the Supreme Court of the United States denied a writ of certiorari to the Supreme Court of Louisiana.

The State has produced evidence to show that EDWARD ADAMS entered a plea of guilty to a charge of simple burglary in this Court on March 9, 1960 and that under this plea he was sentenced to nine years in the State Penitentiary. There was no evidence or testimony heard by the Court in connection with these proceedings. The State also established that the actual prosecution of Adams was conducted by PATRICK T. CAFFERY, an Assistant District Attorney, and that Mr. Tucker was attending a Grand Jury session in the Parish of St. Mary on that day and was not in Court.

It is obvious that the allegation by the defendant that EDWARD ADAMS was convicted on perjured testimony known to Mr. Tucker, the District Attorney, is false.

The defendant bases his defense on the ground that the publication was qualified.

This defense is based on several contentions. They are founded on the provisions of R.S. 14:49 which establish the instances in which publications of this nature are qualifiedly privileged.

One is that the expression is a privilege under paragraph 1 of this article as it relates to a public proceeding.

And under 2 (a) that it relates to the conduct of a person in respect to public affairs, and paragraph 4 extends the privilege to expressions made by a party in a judicial proceeding.

The result of these privileges is that in such cases malice is not presumed but must be established by the State.

As regards these provisions, the contention of the defendant is correct. In order for this court to convict the accused, the State must prove actual malice.

In order to establish it, the State has also introduced in evidence the petition in a civil action brought by the defendant against the said district attorney and other persons for damages because he is alleged to have conspired with the others to prevent the fulfillment of a contract defendant had with a television station in the City of Lafayette for the broadcast of matters alleged

by the petitioner to be the political conditions in Iberia Parish. It was shown that on January 24, 1963 the action was dismissed by the Court for the failure of the plaintiff, defendant herein, to furnish security for costs.

The State showed that in December, 1960 the defendant filed an action in the United States District Court for the Eastern District of Louisiana against the District Attorney, and others, in the amount of $15,000.00 for having conspired to prevent the petitioner from having access to radio, television and newspaper publicity available in the area. He sought to have them enjoined from interfering with his access to these public communication media. On January 9, 1962 the defendant obtained a dismissal of the action in a motion wherein he claimed that this procedure was necessary because he lacked funds to further prosecute it.

Considering these defenses in the light of the evidence we find that under paragraph 1 of this article the publication is privileged when the expression is a fair or true report of public proceedings. Here it is obvious that the report is not true and as we shall see further, it is not fair. Clearly, therefore, the expression is not justified under this provision.

The next point of defense is that the statement relates to a person in respect to public affairs. This expression under the provisions of the statute must be made in a reasonable belief of its truth. The defendant has produced Edward Adams' mother, Edward Adams,

and one Oris Ardoin. Ardoin was charged jointly with Adams. They both pleaded guilty and received similar sentences. The testimony of these witnesses is material only as it bears upon the representations made to the defendant that could lead him to the reasonable belief that the representations were true, or at least, that they had some basis. The substance of the testimony of these witnesses is that the mother told the defendant shortly after her son was sentenced that the District Attorney had advised her shortly before the sentence to tell her son not to plead guilty if he was not guilty; that she encountered her son who was being brought to Court to plead and that she so informed him. The son nevertheless pleaded guilty because he said that he had been promised by the Sheriff and one of his deputies that he would receive a suspended sentence if he entered a plea of guilty. The son said that he wrote a letter shortly after he was at Angola to the defendant claiming that he was innocent.

There was some testimony about the taking of the statements of Adams and Ardoin at Angola but these statements were taken after the alleged defamation and they appear to be irrelevant to the issues under consideration.

It is upon these facts that the defendant depends to show that he had a reasonable basis to make the statement in question.

The decision turns upon the interpretation of these facts as to whether or not they can form the basis

upon which the defendant can rely for a reasonable belief that they were true.

The Court has no hesitancy in holding that they are not a reasonable basis for the truth upon which the defendant can rely. To accuse a District Attorney of causing a person to be sentenced to the penitentiary on testimony that he knows to be false is a serious charge. The defendant did not make any effort to ascertain the truth of these charges in any manner whatsoever. He simply accepted the statement of the accused himself and the representations of his mother. And, accepting these statements as true, they do not show that Mr. Tucker had anything directly to do with the case. No one told the defendant that the alleged false testimony was given to Mr. Tucker. Much less that Mr. Tucker knew it to be false. That conclusion was entirely his own.

As to Edward Adams' guilt or innocence, it should be pointed out that, contrary to his profess of innocence, his alleged accomplice, Oris Ardoin, testified in this case that Adams was with him when they committed the burglary charged.

With little effort, the defendant could have discovered that it was not Mr. Tucker who prosecuted Adams but his assistant; he would have discovered further that no testimony was received and that the man had voluntarily entered a plea of guilty. There is no evidence that Mr. Tucker had any knowledge of the circumstances surrounding Adams' guilt or innocence. This

makes it obvious that he could not have known that the statements leading to the prosecution were false.

It is situations such as this one that our law which denounces the crime of defamation is intended to cover.

Obviously, the defendant chose to utter the expression he did without grounds upon which to base a reasonable belief of its truth.

The other privilege claimed by the defendant is that the utterance was made in a judicial proceeding. This judicial proceeding, as is very evident under our law, is not cognizable by our Supreme Court. It has no jurisdiction to grant the remedies sought by the accused. But even if there were, this could grant him no comfort because he circulated, and caused to be circulated, the defamatory statement to persons other than members of the court. He gave it considerable publicity. To enjoy this privilege one must direct his expression to the Court wherein he is seeking the relief. His filing the petition in the Court did not give him the privilege to give it publication elsewhere.

It is obvious therefore that the circulation of the defamatory expression was motivated by malice. That there was gross animosity between the defendant and the District Attorney is amply shown by the mentioned petitions that the defendant filed in the Supreme Court and elsewhere.

To say that Adams was convicted on false testimony is one thing, but to say that the District Attorney knew this testimony to be false is quite another. There was no basis whatsoever for the defendant to conclude that the District Attorney knew that the evidence was false.

The defendant's counsel has given the Court twenty-two suggested charges. It is questionable that some of them are applicable to the issues here and it is also questionable that some of them are wholly correct. But accepting all of them as being correct law yet none of them can support defendant's acquittal. This is so for the obvious reason that the facts show beyond a reasonable doubt that the accused maliciously published a defamation of the District Attorney which subjected him to hatred, contempt and ridicule. None of the special charges direct that an accused should be acquitted under these circumstances.

Several of the requested charges involve the constitutional privilege of free speech. It is obvious that these constitutional provisions do not permit one to maliciously defame another with expressions that are untrue and which are calculated to bring the other to hatred, contempt and ridicule, just because the other is a public officer.

Rightfully, our United States and State Constitutions grant citizens considerable latitude in expressing themselves relative to public affairs. When these expressions are based on facts that the utterer reasonably believes are true, and the expressions are reasonable

deductions therefrom, our Constitutions afford sanctuary to the utterer.

For there to be a reasonable basis to believe a circumstance true, there must exist something other than a statement of the circumstance. Here there is nothing else.

It should be noted that it is likewise true that our Constitutions contain provisions to protect conscientious public officials against malicious defamation. Good character, good reputation and ability are property to them. These are the assets that enable them to obtain and hold public office. No one can be permitted to destroy these without reason.

In this case the defendant did not have a reasonable basis for the statement he made. It is therefore defamatory, in violation of a specific law, and is not excused by the freedom of speech provisions of our Constitutions.

I THEREFORE render a verdict of guilty as charged.

Filed: January 31, 1963.

(S.) MARGUERITE M. HEBERT,
Dty. Clerk.

Office-Supreme Court, U.S.
FILED
NOV 9 1964
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1964

No. 337

WARREN J. MOITY,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

On Application for Appeal from the Supreme Court of Louisiana or Alternatively Writ of Certiorari to the Supreme Court of Louisiana.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF THE STATE OF LOUISIANA.

JACK P. F. GREMILLION,
Attorney General,
2201 State Capitol,
Baton Rouge, Louisiana;

M. E. CULLIGAN,
Assistant Attorney General,
104 Supreme Court Bldg.,
301 Loyola Avenue,
New Orleans, Louisiana;

J. Y. FONTENOT,
District Attorney,
Opelousas, Louisiana.

Leonard's Brief Service "Specialists in Printing of Briefs", 2014 Clio St., N. O., La. 70113

INDEX.

	Page
MOTION TO DISMISS OR AFFIRM	1
QUESTIONS PRESENTED	2
STATEMENT	3
ARGUMENT	5
CONCLUSION	22

AUTHORITIES CITED.

U. S. CONSTITUTION	
First Amendment	2, 7, 12, 20
Fourteenth Amendment	2, 7, 9, 15, 20
CONSTITUTION OF LA. 1921	
Article 9, Sec. 1	6
Article 9, Sec. 2	6
Article 19, Sec. 9	14
CONSTITUTION OF ILLINOIS	
Article II, Sec. 4, S.H.A.	18
STATUTES OF ILLINOIS	
Revised Statutes of Illinois of 1949	
Title 38, Sec. 471	14
Title 38, Sec. 404	18
ILLINOIS CRIMINAL CODE	
Sec. 224a of Division 1	14

AUTHORITIES CITED—(Continued)

STATUTES OF LOUISIANA

	Page
Revised Statutes of Louisiana of 1950	
Title 14, Section 47	2, 3, 10
Title 14, Section 49	5, 13, 19, 20
Title 14, Section 134	6

TEXT BOOKS

Wharton Criminal Law, Vol. 2, Sec. 878, P. 741	8

JURISPRUDENCE

Cases Cited:

Beauharnais v. People of Illinois, 72 S. Ct. 1304, 354 U. S. 476, 1 L. Ed. (2d) 1498	7, 8
Beauharnais v. The People of the State of Illinois, 343 U. S. 250, 251, 72 S. Ct. 725, 738	10, 14, 15, 16
Breard v. City of Alexandria, 71 S. Ct. 920, 932, 314 U. S. 622	7
Caldwell v. Texas, 137 U. S. 692, 34 L. Ed. 816, 11 S. Ct. Rep. 224	21
Cantwell v. Connecticut, 310 U. S. 296, 307-310, 60 S. Ct. 900, 904, 906, 84 L. Ed. 1213	10, 17, 19
Chaplinsky v. State of New Hampshire, 62 S. Ct. 766, 315 U. S. 568, 86 L. Ed. 1031	7, 9, 17, 19
Clarke v. McDade, 165 U. S. 168, 41 L. Ed. 673, 17 S. Ct. Rep. 284	21
Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049	17

AUTHORITIES CITED—(Continued)

	Page
Dorr v. U. S., 24 S. Ct. 808, 195 U. S. 138, 49 L. Ed. 128	10
Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. Ed. 190, 23 S. Ct. Rep. 123	21
Farmers Education & Coop Union v. W. Day, Inc., 79 S. Ct. 1302, 360 U. S. 525, 3 L. Ed. (2d) 1407	10
Fox Film Corp. v. Muller, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158	20
Gandia v. Pettingill, 32 S. Ct. 127, 222 U. S. 452, 56 L. Ed. 1357	10
Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138	7
Hamblin v. Western Land Co., 147 U. S. 531, 37 L. Ed. 267, 13 S. Ct. Rep. 353	21
Herb v. Pitcairn, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789	20
Illinois C. R. Co. v. Chicago, 176 U. S. 646, 44 L. Ed. 622, 20 S. Ct. Rep. 509	21
Iowa v. Rood, 187 U. S. 87, 47 L. Ed. 86, 23 S. Ct. Rep. 49	21
Leonard v. Vicksburg, S. & P. R. Co. 198 U. S. 416, 49 L. Ed. 1108, 25 S. Ct. Rep. 750	21
Lynch v. People of N. Y., 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191	20

MICRO CARD 22
TRADE MARK ®
MATTHEW BENDER & COMPANY
MB
PC 45
59-59
m
microcard

AUTHORITIES CITED—(Continued)

	Page
Manhattan L. Ins. Co. v. Cohen, 34 S. Ct. 874, 234 U. S. 123, 58 L. Ed. 1245	22
Mellon v. McCafferty, 239 U. S. 134, 36 S. Ct. 94, 60 L. Ed. 181	20
Minneapolis Ry. Co. v. Merrick, 41 S. Ct. 142, 254 U. S. 376, 65 L. Ed. 312	22
Millingar v. Hartupee, 6 Wall. 258, 18 L. Ed. 829	21
McCoy v. Shaw, 277 U. S. 302, 48 S. Ct. 519, 52 L. Ed. 891	20
Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232	17
Near v. Minnesota, 238 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357	7, 10
New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 35 L. Ed. 943, 12 S. Ct. Rep. 142	21
New York Times v. Sullivan, 84 S. Ct. 710	7, 11
Palmer Oil Corporation v. American Petroleum Corporation, 343 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842; see 36 C.J.S. Verbo Federal Courts, Sec. 243, p. 715	22
People of N. Y. ex rel. Doyle v. Atwell, 216 U. S. 590, 43 S. Ct. 410, 67 L. Ed. 814	20
Philadelphia v. Quigley, 62 U. S. 202, 21 Howard 202, 16 L. Ed. 73	10
Respublica v. Oswald, 1 U. S. 319, 1 Dall 319, 1 L. Ed. 155	7, 8

AUTHORITIES CITED—(Continued)

	Page
St. Louis C. G. & Ft. S. R. Co. v. Missouri, 156 U. S. 478, 39 L. Ed. 502, 15 S. Ct. Rep. 443	21
State of Louisiana v. Cox (1964), 167 So. (2d) 352	11
State of Louisiana v. Garrison (1963), 154 So. (2d) 400, 244 La. 787	11
State of Louisiana v. Webster (1963), 245 La. 523, 159 So. (2d) 140	11
State of Louisiana v. Moity, 245 La. 546, 159 So. (2d) 149	4
Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093	17
White v. Nicholls, 44 U. S. 266, 3 Howard 266, 11 L. Ed. 591	10
Zucht v. King, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194	21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1964

No. 337

WARREN J. MOITY,

Appellant,

versus

STATE OF LOUISIANA,

Appellee.

On Application for Appeal from the Supreme Court of Louisiana or Alternatively Writ of Certiorari to the Supreme Court of Louisiana.

MOTION TO DISMISS OR AFFIRM ON BEHALF OF THE STATE OF LOUISIANA.

Pursuant to Paragraph 1C of Rule 16 of the revised rules of this Court, Jack P. F. Gremillion, Attorney General of the State of Louisiana and the State of Louisiana move that this appeal be dismissed and that the alternative plea for writ of certiorari be denied, and in the alternative that the judgment of the Louisiana Supreme Court be affirmed.

QUESTIONS PRESENTED.

1. Whether it is a violation of the First Amendment of the United States Constitution, prohibiting the abridgment of freedom of speech, which said amendment is made applicable to the citizens of the States, through the Due Process Clause of the Fourteenth Amendment of the United States Constitution, to hold that the statement set forth in the Bill of Information, attributed to appellant herein, Warren J. Moity, is a violation of Louisiana Revised Statutes 14:47 (Appendix 1), defining the crime of defamation, or to interpret the said Louisiana Revised Statutes 14:47 (Appendix 1), so as to include within the scope thereof the statement set forth in such Bill of Information.

2. Whether it is a violation of the First Amendment of the United States Constitution, prohibiting the abridgment of freedom of speech, which said amendment is made applicable to the citizens of the States, through the Due Process Clause of the Fourteenth Amendment of the United States Constitution, to hold that appellant herein, Warren J. Moity, was and is guilty of a violation of Louisiana Revised Statutes 14:47 (Appendix 1), or of any unlawful act whatsoever, by virtue of the statement attributed to him in and by the Bill of Information forming the basis of his prosecution in the District Court, or under the facts, circumstances and proof adduced at the trial of this case in the District Court, when such statements forming the basis of his prosecution in the District Court was an allegation made by said appellant, Warren J. Moity, on information and belief, in a petition filed in the Supreme Court of the State of Louisiana, by said appellant, said allegation being contained in and forming a part of said petition.

STATEMENT OF THE CASE.

On or about August 24, 1962, Warren J. Moity, appellant herein, filed in the Supreme Court of Louisiana, which is the Court of Last Resort in Louisiana, a document entitled:

> "IN RE: WARREN J. MOITY, APPLICATION FOR RELIEF AGAINST ELECTION FRAUD, COLLUSION BETWEEN PUBLIC OFFICIALS CREATING MISUSE OF PUBLIC MONEY, BRUTALITY OF CITIZENS AND LAWLESSNESS, BY OFFICIALS OF IBERIA PARISH, AS PROVIDED FOR IN THE CONSTITUTION OF THE STATE OF LOUISIANA."

He caused copies of this so called petition to receive wide distribution and publication in the Parish of Iberia, Louisiana. This is one of three Parishes (Counties) comprising the Sixteenth Judicial District of Louisiana. The other two Parishes in the District are St. Martin and St. Mary. Knowles M. Tucker is the duly elected District Attorney serving in that district.

On October 16, 1962, District Attorney Tucker filed an affidavit against Moity charging him with public defamation in violation of Louisiana Revised Statutes, Title 14, Section 47, alleging that he was defamed by the appellant, Moity, and in particular that he was defamed by the said accused by the statements made in paragraph 39 of the above mentioned document which reads:

> "Petitioner is informed, believes and therefore upon such information and belief alleges, that one Edward Adams, PMB 53003, a colored male, was

illegally committed to the Louisiana State Penitentiary **on perjured testimony, known to** Sheriff Gerard Wattigny and the **District Attorney Knowles M. Tucker** from the 16th Judicial District Court, in and for the Parish of Iberia."

On October 26, 1962, on motion of District Attorney Tucker an order was entered recusing Tucker as District Attorney, and pursuant to law Honorable J. Y. Fontenot, District Attorney, St. Landry Parish, was named to prosecute the cause.

District Attorney Fontenot filed an information against the accused on December 10, 1962 (See Appendix 2).

After having filed a motion for a bill of particulars and other preliminary proceedings Moity filed a motion to quash the information in which he raised the question of the constitutionality of the statute under which he was being prosecuted. The motion to quash was overruled and a bill of exceptions was duly reserved and perfected as Bill of Exception # 1.

Moity was tried, in due course, and found guilty by the trial Judge without a jury. The crime of defamation is a misdemeanor, L. S. A. 15:341 (Appendix 3), and not triable before a jury, L. S. A. 15:340 (Appendix 4). He was sentenced to pay a fine of $1,000.00 and costs or to serve sixty (60) days in the Parish Jail. He appealed from the verdict and sentence to the Supreme Court of Louisiana, where the judgment was affirmed. *State v. Moity*, 245 La. 546, 159 So. (2d) 149 (Appendix 5). Rehearing was denied January 20, 1964.

It is from the above judgment that appeal or certiorari to this Honorable Court is sought.

ARGUMENT.

It has long been held that freedom of speech, like all freedoms, must be exercised with that restraint which will also accord every other individual his rights equally guaranteed by the United States Constitution.

The Louisiana Statute under consideration makes it a prerequisite for conviction of defamation in a case of this type that the State allege and prove actual malice. *Louisiana Revised Statutes* 14:49 states:

L. S. A., R.S. 14:49: QUALIFIED PRIVILEGE:

"A qualified privilege exists and **actual malice must be proved, regardless of whether the publication is true or false,** in the following situations:

"(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

"(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

(a) The conduct of a person in respect to public affairs; or

(b) A thing which the proprietor thereof offers or explains to the public.

"(3) Where the publication or expression is made to a person interested in the communication,

by one who is also interested or who stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

"(4). Where the publication or expression is made by an attorney or party in a judicial proceeding."

The District Court held that the defendant had a qualified privilege in this case, the State recognized that the defendant had a qualified privilege when it charged in the information that he 'unlawfully and maliciously' made the statement referred to. The Louisiana Supreme Court recognized the qualified privilege.

In this connection it should be pointed out that the complainant is an Attorney at law and that the defamatory statement attributed to the defendant would not only tend to injure him in his public life, **but in his private life as well.**

In Louisiana a District Attorney committing the acts outlined in the above quoted excerpt from Moity's so called "petition" could be guilty of Malfeasance in Office as defined by Louisiana Revised Statutes Title 14, Section 134 (Appendix 6).

It would subject the District Attorney guilty of such practice to impeachment, La. Const. Art. 9, Sec. 1 (Appendix 7), and could result in his being barred forever from practicing law in the State; La. Const. Art. 9, Sec. 2 (Appendix 8).

While there is no questioning the fact that a public official must be prepared to accept criticism concerning

his conduct of his office, certainly the constitution is not intended to, nor does it, require any person to stand idly by and see his entire career ruined by that favorite weapon of the propagandist the oft repeated BIG lie.

A civil judgment could not render compensation adequate in a case of this type but a criminal prosecution can and does brand the defamer for what he is, nothing more than a common criminal.

It is well settled that libelous or slanderous utterances are not protected by the freedom of speech guarantee of the first and fourteenth amendments of the U. S. Constitution. *Respublica v. Oswald*, 1 U. S. 319, 1 Dall 319, 1 L. Ed. 155; *Chaplinsky v. State of New Hampshire*, 62 S. Ct. 766, 315 U. S. 568, 86 L. Ed. 1031; *Beauharnais v. People of Illinois*, 72 S. Ct. 1304, 354 U. S. 476, 1 L. Ed. (2d) 1498; *Breard v. City of Alexandria*, 71 S. Ct. 920, 932, 341 U. S. 622; *Gitlow v. New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138; *Near v. Minnesota*, 238 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357.

This Court has recently in the case of *New York Times v. Sullivan*, 84 Sup. Ct. 710, said, in regard to a civil libel suit, "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

The purpose of criminal libel or defamation statutes is two fold: the preservation of the public peace and

the protection of all members of society from injury resulting from malicious utterances. See *Republica v. Oswald*, 1 U. S. 319, 1 Dall 319, 1 L. Ed. 155; *Beauharnais v. People*, *supra*; 2 Whartons Criminal Law Section 878, p. 741.

The evil of defamatory utterances is aptly discussed in the *Oswald* case as follows:

> "With respect to the heart of the libeler, it is more dark and base than that of the assassin, or than his who commits a midnight arson. It is true, that I may never discover the wretch who has burned my house, or set fire to my barn; but these losses are easily repaired, and bring with them no portion of ignominy or reproach. But the attacks of the libeler admit not of this consolation; the injuries which are done to character and reputation seldom can be cured, and the most innocent man may in a moment be deprived of his good name, upon which, perhaps, he depends for all the prosperity, and all the happiness of his life. To what tribunal can he then resort, how shall he be tried, and by whom shall he be acquitted? It is in vain to object, that those who know him will disregard the slander, since the wide circulation of public prints must render it impracticable to apply the antidote as far as the poison has been extended. Nor can it be fairly said, that the same opportunity is given to vindicate, which has been employed to defame him; for many will read the charge, who may never see the answer; and while the object of accusation is publicly pointed at, the malicious and malignant author, rests in the dishonorable security of an anonymous signature. Where much has been said, something will be be-

lieved, and it is one of the many artifices of the libeler, to give to his charges an aspect of general support, by changing and multiplying the style and name of his performances. But shall such things be transacted with impunity in a free country, and among an enlightened people? Let every honest man make this appeal to his heart and understanding, and the answer must be—no!"

Chaplinsky v. State of New Hampshire, 62 S. Ct. 766, 315 U. S. 568, 86 L. Ed. 1031, recognized that a state has the right to protect its citizens from injury caused by defamatory utterances. The Court made the following observation:

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tends to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by

the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 U. S. 296, 309-310."

The Louisiana defamation statute (R. S. 14:47-50) is in accord with the federal jurisprudence on libelous statements, including what constitutes a defamatory utterance, privilege, fair comment on public officials, and the destruction of privilege by excess or by actual malice. *White v. Nicholls*, 44 U. S. 266, 3 Howard 266, 11 L. Ed. 591; *Dorr v. U. S.*, 25 S. Ct. 808, 195 U. S. 138, 49 L. Ed. 128; *Philadelphia v. Quigley*, 62 U. S. 202, 21 Howard 202, 16 L. Ed. 73; *Gandia v. Pettingill*, 32 S. Ct. 127, 222 U. S. 452, 56 L. Ed. 267; *Farmers Education & Coop Union v. W. Day, Inc.*, 79 S. Ct. 1302, 360 U. S. 525, 3 L. Ed. (2d) 1407; *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357.

The State of Louisiana, as its defamation statute (R. S. 14:47-50) and its jurisprudence show has no tolerance whatever for any special claim by any public officer of immunity from criticism. It is submitted, however, that under the *Chaplinsky* and *Beauharnais* decisions, *supra*, the first and fourteenth amendments do not deprive the state in a defamation prosecution of its right and duty to preserve the public peace and to protect all members of society, from the evils of malicious libelous utterances.

It must be remembered also that the defamatory words here attributed to the appellant would not only injure District Attorney Tucker in his public life but also in his private and personal business and occupation as an attorney and counsellor at law.

We therefore respectfully submit that the constitutionality of this statute may not be properly determined in its application to this case **on the narrow grounds that we are involved here alone with criticism of a public official** in regard to the performance of his duties, or the conduct of his office.

The Supreme Court of the State of Louisiana has held the particular Statute here attacked Constitutional in several recently decided cases:

State v. Webster (1963), 245 La. 523, 159 So. (2d) 140;
State v. Garrison (1963), 154 So. (2d) 400, 244 La. 787;
State v. Cox (1964), 167 So. (2d) 352.

The *Cox* case was decided subsequent to the case of *New York Times v. Sullivan, supra*, and in discussing the *Sullivan* case the Court had this to say on constitutionality of the statute under consideration; 167 So. (2d) 352:

> "In the New York Times case the Supreme Court was considering Alabama Law dealing with civil libel. Here we are concerned with a criminal statute defining and denouncing the crime of defamation, for a conviction of which all essential elements of the crime, malice being one, must be proved beyond a reasonable doubt.
>
> "Louisiana R. S. 14:49 grants to persons charged with the crime of defamation under R. S. 14:47 a qualified privilege under certain situations as there set forth, one of these being where the expression is upon the conduct of a person in respect to public affairs and is made in the reasonable belief of its

truth. The statute provides that in such a case actual malice must be proved regardless of whether the expression is true or false. The redactors' comment under the article explains that when a qualified privilege exists, no presumption of malice would arise * * *

"**We view our statute as being fully in accord with the New York Times pronouncements, conceding that case of civil libel is applicable to our criminal defamation legislation, and as fully safeguarding those accused under it in conformance with the First Amendment.** Our statute permits the qualified privilege to exist, regardless of whether the publication was true or **false**, when it is a comment made in the reasonable belief of its truth upon the conduct of a person in respect to public affairs, and in such case **actual malice** must be proved by the state. Our criminal statutory requirements for proving actual malice are in accord with those set out by the New York Times case for civil libel. Our statute is clearly constitutional when measured by the standards set out in the New York Times case to satisfy the First Amendment.

"Assuming, arguendo, that there is no conflict between our legislation and the Times decision, appellant argues further on the basis of Mr. Justice Goldberg's concurring opinion in that case that the First Amendment affords citizens an absolute privilege to criticize official conduct. We are not prepared to go thus far. In our opinion our statute is not repugnant to the First Amendment simply because it recognizes that the public have an interest

in the maintenance of the public character of public men. Public affairs could not be conducted by men of honor, with a view to the welfare of the country, if attacks upon them could be made at will, destructive of their honor and character and made wholly without foundation. Our statute sufficiently protects those honestly criticizing their public officials as to their official conduct to satisfy the First Amendment, but it properly forbids unjustified malicious attacks upon them."

In the case at bar we are not only dealing with statements that the fact finder (The District Court) found were uttered with actual malice, but with a statement that the District Court found, as a fact, was false as well.

"It is obvious that the allegation by the defendant that Edward Adams was convicted on perjured testimony known to Mr. Tucker, the District Attorney, is false."

It is submitted that we need go no further to show that this is not a proper case either for an appeal or for certiorari.

The claim is that the statute is unconstitutional. Manifestly it meets all tests of constitutionality as heretofore laid down by this Honorable Court.

The State in this case has charged that the statements were made with malice, the district Judge held that a qualified privilege existed in favor of the defendant (Moity) under La. R. S. 14:49; but found, as a fact, that he could not claim it, not only because his statement was made with malice but because it was false as well. Truth

is a defense guaranteed by the La. Const. Art. 19, Section 9.

On the trial of this matter, appellant had the opportunity to interpose the defense of truth or reasonable belief of truth. Despite the fact that complainant testified under oath that the statement made by appellant and set forth *in toto* in the Bill of Information was untrue, appellant did not offer any evidence to rebut this testimony.

Appellant had been informed that the state intended to prove malice by the Bill of Information filed.

During the trial the state introduced evidence showing other statements of appellant which the Court found substantiated the state's contention that the statement of appellant constituted malice in law and also malice in fact.

We would also like to point out that the complainant testified that the defamatory statement of appellant subjected him to ridicule, embarrassment and contempt.

We quote from *Beauharnais v. The People of the State of Illinois*, 343 U. S. 250, 251, 72 Supreme Court 725, 728, as follows:

> "The petitioner was convicted upon information in the Municipal Court of Chicago of violating Sec. 224a of Division 1 of the Illinois Criminal Code, Ill. Rev. Stat. 1949, c. 38, Sec. 471. He was fined $200. The section provides:
>
> " 'It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any

public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. * * *'

"Beauharnais challenged the statute as violating the liberty of speech and of the press guaranteed as against the States by the Due Process Clause of the Fourteenth Amendment, and as to vague, under the restrictions implicit in the same Clause, to support conviction for crime. The Illinois courts rejected these contentions and sustained defendant's conviction. 408 Ill. 512, 97 N. E. 2d 343.

"We granted certiorari in view of the serious questions raised concerning limitations imposed by the Fourteenth Amendment on the power of a State to punish utterances promoting friction among racial and religious groups. 342 U. S. 809, 72 S. Ct. 39.

"The information, cast generally in the terms of the statute, charged that Beauharnais 'did unlawfully * * * exhibit in public places lithographs, which publications portray depravity, criminality, unchastity or lack of virtue of citizens of Negro race and color and which exposes (sic) citizens of Illinois of the Negro race and color to contempt, derision, or obloquy * * *'. The lithograph complained of was a leaflet setting forth a petition calling on the Mayor and City Council of Chicago 'to halt the fur-

ther encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro * * *'. Below was a call for 'One million self respecting white people in Chicago to unite * * *'. With the statement added that 'If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions * * * rapes, robberies, knives, guns and marijuana of the negro, surely will.' This, with more language, similar if not so violent, concluded with an attached application for membership in the White Circle League of America, Inc.

"The testimony at the trial was substantially undisputed. From it the jury could find that Beauharnais was president of the White Circle League; that, at a meeting on January 6, 1950, he passed out bundles of the lithographs in question, together with other literature, to volunteers for distribution on downtown Chicago street corners the following day, that he carefully organized that distribution, giving detailed instructions for it; and that the leaflets were in fact distributed on January 7 in accordance with his plan and instructions. The court, together with other charges on burden of proof and the like, told the jury, 'if you find * * * that the defendant, Joseph Beauharnais, did * * * manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place the lithograph * * * then you are to find the defendant guilty * * *.' He refused to charge the jury, as requested by the defendant, that in order to convict they must find 'that the article complained of was

likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest.' Upon this evidence and these instructions, the jury brought in the conviction here for review.

"The statute before us is not a catchall enactment left at large by the State court which applied it. Cf. Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093; Cantwell v. State of Connecticut, 310 U. S. 296, 307, 60 S. Ct. 900, 904, 84 L. Ed. 1213. It is a law specifically directed at a defined evil, its language drawing from history and practice in Illinois and in more than a score of other jurisdictions a meaning confirmed by the Supreme Court of that State in upholding this conviction. We do not, therefore, parse the statute as grammarians or treat it as an abstract exercise in lexicography. We read it in the animating context of well-defined usage, Nash v. United States, 229 U. S. 373, 33 S. Ct. 780, 57 L. Ed. 1232, and State court construction which determines its meaning for us. Cox v. State of New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049; Chaplinsky v. State of New Hampshire, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.

"The Illinois Supreme Court tells us that Section 224a 'is a form of criminal libel law'. 408 Ill. 512, 517, 97 N. E. 2d 343, 346. The defendant, the trial court and the Supreme Court consistently treated it as such. The defendant offered evidence tending to prove the truth of parts of the utterance, and the courts below considered and disposed of this offer in terms of ordinary criminal libel precedents. Section

224a does not deal with the defense of truth, but by the Illinois Constitution, Art. II Section 4, S.H.A., 'in all trials for libel, both civil and criminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.' See also Ill. Rev. Stat., 1949, c. 38, Section 404. Similarly, the action of the trial court in deciding as a matter of law the libelous character of the utterance, leaving to the jury only the question of publication, follows the settled rule in prosecutions for libel in Illinois and other States. Moreover, the Supreme Court's characterization of the words prohibited by the statute as those 'liable to cause violence and disorder' paraphrases the traditional justification for punishing libels criminally, namely their 'tendency to cause breach of the peace.'

"Libel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives was no defense. In the first decades after the adoption of the Constitution, this was changed by judicial decision, statute or constitution in most States, but nowhere was there any suggestion that the crime of libel be abolished. Today, every American jurisdiction—the forty-eight States, the District of Columbia, Alaska, Hawaii and Puerto Rico—punish libels directed at individuals. 'There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an

immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. State of Connecticut, 310 U. S. 296, 309, 310, 60 S. Ct. 900, 906, 84 L. Ed. 1213.' Such were the views of an unanimous Court in Chaplinsky v. State of New Hampshire, supra, 315 U. S. at pages 571-572, 62 S. Ct. at page 769."

Stripped of nonessentials, appellant's claim is one of federal immunity or privilege from prosecution for defamation for the sole reason that his defamatory remarks were directed toward a person who happened to be a public official.

In R. S. 14:49, the Louisiana Defamation Statute grants a qualified privilege for fair criticism or fair comment upon a public officer's official conduct.

During the trial of this case, appellant raised the defense of qualified privilege, this defense was passed upon by the State Trial Court, which found as a fact from the evidence before it, that there was no proof adduced of appellant's reasonable belief in the truth of his utterance and because his utterance, in certain respects, abused the privilege by going beyond mere criticism or comment; that

even if qualified privilege had existed, it was destroyed by defendant's actual malice which was shown by the evidence, produced by the state on the trial of the case. These determinations of the Trial Court were affirmed by the State Supreme Court and are in harmony with the federal jurisprudence on libel.

In granting appellant a qualified privilege from prosecution for defamatory expressions about public officers' official conduct, L. S. A., R.S. 14:49 gave him the same right to criticize a District Attorney which is guaranteed under the free speech provisions of the First and Fourteenth Amendments. When the State Court considered appellant's defense of qualified privilege and determined from the facts and the evidence of the case that appellant's utterance was not qualifiedly privileged under L. S. A., R.S 14:49, it based its decision upon a non-federal ground, independent of the federal question involved, broad enough to sustain the judgment and in harmony with the decisions of the United States Supreme Court in libel cases. The United States Supreme Court has always refused to review judgments of State Courts that rest on adequate and independent state grounds. *McCoy v. Shaw*, 277 U. S. 302, 48 S. Ct. 519, 52 L. Ed. 891; *Mellon v. McCafferty*, 239 U. S. 134, 36 S. Ct. 94, 60 L. Ed. 181, *People of N. Y. ex rel. Doyle, v. Atwell*, 216 U. S. 590, 43 S. Ct. 410, 67 L. Ed. 814; *Lynch v. People of N. Y.*, 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191; *Fox Film Corp. v. Muller*, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158; *Herb v. Pitcairn*, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789.

From a reading of the opinion of the Louisiana Supreme Court, one must conclude that its decision was in

accord with both the State and Federal jurisprudence. While it is a well established legal principle that it may, with some show of reason, be said that, no matter how lacking in merit the Federal contention may be, the Supreme Court of the United States cannot logically, for that reason alone, decline to entertain jurisdiction of a writ of error to a state Court, still the Court is committed to the doctrine that a real, and not a fictitious, Federal question is essential to the exercise of this jurisdiction. *Hamblin v. Western Land Co.*, 147 U. S. 531, 37 L. Ed. 267, 13 Sup. Ct. Rep. 353; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 35 L. Ed. 943, 12 Sup. Ct. Rep. 142; *Millingar v. Hartupee*, 6 Wall. 258, 18 L. Ed. 829; *Caldwell v. Texas*, 137 U. S. 692, 34 L. Ed. 816, 11 Sup. Ct. Rep. 224; *St. Louis C. G. & Ft. S. R. Co. v. Missouri*, 156 U. S. 478, 39 L. Ed. 502, 15 Sup. Ct. Rep. 443; *Illinois C. R. Co. v. Chicago*, 176 U. S. 646, 44 L. Ed. 622, 20 Sup. Ct. Rep. 509; *Equitable Life Assur. Soc. v. Brown*, 187 U. S. 308, 47 L. Ed. 190, 23 Sup. Ct. Rep. 123; *Clarke v. McDade*, 165 U. S. 168, 41 L. Ed. 673, 17 Sup. Ct. Rep. 284; *Iowa v. Rood*, 187 U. S. 87, 47 L. Ed. 86, 23 Sup. Ct. Rep. 49.

A Federal question may have been so explicitly foreclosed by prior federal decisions as to afford no basis for a writ of error from the Supreme Court of the United States to a state Court. *Leonard v. Vicksburg, S. & P. R. Co.*, 198 U. S. 416, 49 L. Ed. 1108, 25 Sup. Ct. Rep. 750.

No substantial federal question is presented when the state Court is clearly correct in its interpretation of the federal question, and where the federal question suggested has been foreclosed by previous federal jurisprudence. *Zucht v. King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed.

194; *Palmer Oil Corporation v. Amerada Petroleum Corporation*, 343 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842; see 36 C. J. S. Verbo Federal Courts, Sec. 243, p. 715; *Minneapolis Ry. Co. v. Merrick*, 41 S. Ct. 142, 254 U. S. 376, 65 L. Ed. 312; *Manhattan L. Ins. Co. v. Cohen*, 34 S. Ct. 874, 234 U. S. 123, 58 L. Ed. 1245.

The Louisiana Supreme Court is undubitably correct in its opinion on both the state and federal questions as can be seen by reference to the opinion and the authorities cited above. The jurisprudence is well settled that libelous utterances are not within the area of constitutionally protected speech under the first amendment of the constitution of the United States, and such libelous utterances can be prohibited by state law which imposes criminal penalties.

It is therefore respectfully submitted that the Appellant has failed to raise a substantial Federal question and that this appeal should be dismissed, and alternatively the plea for writs of certiorari should be denied.

The State further respectfully submits that in the event that this appeal is granted that the decision of the state Court be affirmed.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
2201 State Capitol,
Baton Rouge, Louisiana;

M. E. CULLIGAN,
Assistant Attorney General,
State of Louisiana,
104 Supreme Court Building,
301 Loyola Avenue,
New Orleans, Louisiana;

J. Y. FONTENOT,
Acting District Attorney,
16th Judicial District,
State of Louisiana,
Opelousas, Louisiana.

CERTIFICATE.

I, Michael E. Culligan, a member of the Bar of the United States Supreme Court, hereby certify that this day of November, 1964, a copy of the above and foregoing Brief was served on Messrs. Bentley G. Byrnes, Owen J. Bradley, New Orleans, Louisiana, and Emile A. Carmouche, Jr., Crowley, Louisiana, at their proper addresses, by depositing same in the United States mail, postage prepaid.

OF COUNSEL.

APPENDIX 1.

L. S. A., R.S. 14:47: DEFAMATION

Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

(3) To injure any person, corporation, or association of persons in his or their business or occupation.

Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both.

APPENDIX 2.

INFORMATION

STATE OF LOUISIANA	16TH JUDICIAL DISTRICT COURT
VS.	PARISH OF IBERIA
WARREN J. MOITY	STATE OF LOUISIANA

J. Y. FONTENOT, Acting District Attorney of the Sixteenth Judicial District of the State of Louisiana, who, in the name and by the authority of the said State, prosecutes in this behalf, in proper person, comes into the Sixteenth

Judicial District Court of the State of Louisiana, in and for the Parish of Iberia, and gives the said Court here to understand and be informed that one

WARREN J. MOITY

late of the Parish of Iberia, on or about the 25th day of August in the year of our Lord 1962, in the Parish of Iberia, aforesaid and within the jurisdiction of the Sixteenth Judicial District of the State of Louisiana did defame Knowles M. Tucker by unlawfully and maliciously publishing and expressing in writing to persons other than the party defamed, the following statement, "That one Edward Adams, PMB 53003, a colored male, was illegally committed to the Louisiana State Penitentiary on perjured testimony, known to Sheriff Gerard Wattigny and the District Attorney Knowles M. Tucker from the 16th Judicial District, in and for the Parish of Iberia," which statement tends to expose said Knowles M. Tucker to hatred, contempt and rjdicule and to deprive him of the benefit of public confidence and to injure him in his business and occupation, in violation of La. R. S. 14:47: DEFAMATION, contrary to the form of the Statutes of the State of Louisiana, in such case made and provided and against the peace and dignity of the same.

/s/ J. Y. Fontenot

Acting District Attorney, 16th Judicial District of the State of Louisiana

FILED: Dec. 10, 1962
s S. J. Segura

Deputy Clerk of Court

APPENDIX 3.

L. S. A., R.S. 15:341

§ 341. Misdemeanor defined

A misdemeanor is defined to be an offense, the punishment of which is necessarily a fine or imprisonment in the parish jail or both.

La. R.S. 15:342

§ 342. Right to waive trial by jury

Whenever the offense charged in the indictment is capital, or necessarily punishable with imprisonment at hard labor, the defendant can not waive trial by jury; in all other cases he may elect to be tried by the judge alone.

APPENDIX 4.

La. R.S. 15:340

§ 340. Trial of misdemeanors

Every misdemeanor shall be triable by the judge without the intervention of a jury.

APPENDIX 5.

245 La. 546, 159 So. (2d) 149

STATE of Louisiana

v.

Warren J. MOITY.

No. 46708.

FOURNET, Chief Justice.

The defendant, Warren J. Moity, having been charged in a Bill of Information with the defamation of Knowles M. Tucker, district attorney of Iberia Parish, in violation of R.S. 14:47,[1] is appealing from his conviction and sentence thereunder to pay a fine of $1,000 and costs; in default thereof, to serve 60 days in the parish jail. For the reversal of this conviction and sentence he relies on errors allegedly committed during the course of the trial

[1] The pertinent portion of R.S. 14:47 provides that "Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends: (1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or * * * injure" him "in his * * * business or occupation." It is further stipulated in this article that "Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both."

to which timely objection was made, these being preserved in five Bills of Exceptions that were duly perfected.

The prosecution is predicated on Article 39 of a 106-paragraph petition filed by Moity in the Louisiana Supreme Court in which he sought a public hearing for the purpose of establishing the violation of public trust by various officials of Iberia Parish, and specifically charged that Tucker had "illegally committed to the Louisiana State Penitentiary on perjured testimony, known to Sheriff Gerard Wattigny and the District Attorney Knowles M. Tucker from the 16th Judicial District, in and for the Parish of Iberia," one Edward Adams, PMB 53003.

In a motion to quash the information the defendant contended it was fatally defective in that it (1) contains no allegations of fact that are defamatory and does not, therefore, charge a crime; (2) is based on a statement attributed to the defendant as having been made in a petition in a legal proceeding and is, therefore, qualifiedly privileged; and (3) is unconstitutional if this statement is violative of R.S. 14:47, defining the crime of defamation and fixing the penalty therefor, or is construed as coming within its scope, for this would abridge the freedom of speech guaranteed by the First Amendment to the Constitution of the United States and the prohibition therein against the passage by Congress of any statute contravening this guaranty, which prohibition extends to the State of Louisiana through the provisions of the Fourteenth Amendment to the federal constitution. When the trial judge overruled this motion, the first Bill of Exceptions was reserved.

These identical issues were urged in a similar case on appeal here, State v. Webster, La., 159 So. 2d 140, and were there adjudicated adversely to the accused. See, also, State v. Garrison, 244 La. 787, 154 So. 2d 400, and the authorities therein cited.

[1] There is clearly no merit to the first contention for a mere reference to the information will disclose the defendant was charged, in language tracking the pertinent provisions of R.S. 14:47 as set out above in Footnote No. 1, with having, on or about August 25, 1962, in the Parish of Iberia, "unlawfully and maliciously" published and expressed "in writing to persons other than the party defamed," the above quoted statement from the petition filed by him in our court. To charge a person who is, by law, sworn to prosecute all offenses and crime occurring within his jurisdiction, as did the defendant in seeking a public hearing in that instance, with having illegally committed a person to the state penitentiary is tantamount to accusing him of malfeasance in office. To further charge this action was taken on testimony known to the prosecutor to be perjured adds to the gravity thereof. It is unquestioned such a statement would tend to expose this public official to hatred, contempt, and ridicule, as well as to deprive him of the benefit of public confidence, thus injuring him in his business and occupation—not only as a district attorney but also as a lawyer.

[2, 3] The second ground urged as the basis for the motion to quash the information is equally without merit. As pointed out in the case of State v. Webster, supra, "the fact that the communication was qualifiedly privileged does not of itself render the information ineffec-

tive, the state having charged that the alleged libel was uttered maliciously," which, of necessity, presents a matter for determination on the merits.[2]

[4] In disposing of similar charges of unconstitutionality as set out under the third contention, we recognized in the Garrison case, supra, that under decisions of the United States Supreme Court the freedoms guaranteed individuals under the First Amendment are protected under the Fourteenth Amendment from invasion by the states. See, also, State v. Cox, La., 158 So. (2d) 172.

However, these prohibitions against invasion by the states as set forth in the decisions of the highest court of our country are not so all-inclusive they cover with a protecting blanket any and all statements made or published by individuals or organizations. In the early and celebrated case of People v. Croswell, decided in 1804, where the defendant was accused of defaming the then President of the United States, Thomas Jefferson, it was pointed out that "The founders of our governments were too wise and too just ever to have intended, by the freedom of the press, a

[2] In Chapter 5 of the Louisiana Criminal Code, under the heading "Defamation," and following the definition thereof as set out under Article 47, quoted above in Footnote No. 1, follows the next article, which provides that "Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown," whereas if such "publication or expression is true, actual malice must be proved in order to convict the offender." Article 48. Further, "A qualified privilege exists *and actual malice must be proved*, regardless of whether the publication is true or false, in the following situations: (1) Where the publication or expression is a fair and true report of any judicial * * * proceeding * * * (2) Where the publication or expression is a comment made in the reasonable belief of its truth * * * (4) Where the publication or expression is made by an attorney or party in a judicial proceeding." Article 49 of the Louisiana Criminal Code. All of these articles are now incorporated in the Revised Statutes of 1950 as R. S. 14:47, 48, and 49. (The emphasis has been supplied.)

right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men to cherish, for mischievous purposes, sedition, irreligion, and impurity. Such an abuse of the press would be incompatible with the existence and good order of civil society." 3 Johnson's cases, at page 337.

The decisions of the states, as well as of the United States Supreme Court and the recognized and renowned commentators on the source and meaning of the provisions of our federal constitution and Bill of Rights, are replete with expressions reflecting that the primary purpose for the guaranty of freedom of speech and the press in the First Amendment was to insure that *previous restraints* upon the publication of beliefs, whether spoken or written, would be prohibited—not that those disseminating them could do so with impunity and thus go unchallenged if the consequences of such publication unjustifiably damaged others. See, Patterson v. Colorado ex rel. Attorney General, 205 U. S. 454, 27 S. Ct. 556, 51 L. Ed. 879; Near v. Minnesota ex rel. Olson, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357; Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470; State v. Van Wye, 136 Mo. 227, 37 S. W. 938; State v. Boyd, 86 N. J. L. 75, 91 A. 586; National Labor Relations Board v. M. E. Blatt Co., 3 Cir., 143 F. 2d 268, certiorari denied 323 U. S. 774, 65 S. Ct. 135, 89 L. Ed. 619; People v. Feiner, 300 N. Y. 391, 91 N. E. 2d 316, affirmed 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295; Times Film Corporation v. City of Chicago, D. C., 139 F. Supp. 837, affirmed 7 Cir., 244 F. 2d 432, reversed on other grounds at 355 U. S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72; Shively v. Garage Employees Local Union

No. 44, 6 Wash. 2d 560, 108 P. 2d 354; Baxley v. United States, 4 Cir., 134 F. 2d 937; 6 R. C. L. 253, Sections 239-242; 33 Am. Jur. 291, Section 308, et seq., and the authorities therein cited.

To state it succinctly as was done in State v. Van Wye, supra, "The laws punishing criminal libel have never been deemed an infringement of this constitutional guaranty." In that decision it was further pointed out that "The constitutional liberty of speech and of the press, as we understand it, simply guarantees the right to freely utter and publish whatever the citizen may desire, and to be protected in so doing, *provided, always, that such publications are not blasphemous, obscene, and scandalous in their character, so that they become an offense against the public, and, by their malice and falsehood, injuriously affect the character, reputation, or pecuniary interests of individuals. The constitutional protection shields no one from responsibility for abuse of this right.*" (The emphasis has been supplied.)

In discussing the purpose of these constitutional privileges as historically conceived and guaranteed, the United States Supreme Court, in Near v. Minnesota ex rel. Olson, supra, pointed out: "In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty *to prevent previous restraints upon publication.* The struggle in England (from which country the criminal law of Louisiana is deraigned), directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of

the press is indeed essential to the nature of a free state; but this consists in laying *no previous restraints upon publication, and not in freedom from censure for criminal matter when published.* Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but *if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.*'" 283 U. S. at pages 713 and 714, 51 S. Ct. at pages 630, 75 L. Ed. 1357. (The emphasis and words within brackets have been supplied.)

It is on this theory that statutes of the various states regulating the dissemination of information—both spoken and printed, and pictures as well as words—have been held to be constitutional, and statutes denouncing libels and defamations as crimes maintained. They are considered as having been enacted under a valid exercise of the police power of the various states and not, therefore, to be an unconstitutional invasion by the states of the freedoms of speech and the press as guaranteed by the First Amendment. The authorities sustaining this view are legion. See, Adams Newark Theatre Co. v. City of Newark, 22 N. J. 472, 126 A. 2d 340, affirmed 354 U. S. 931, 77 S. Ct. 1395, 1 L. Ed. 2d 1533, rehearing denied 355 U. S. 851, 78 S. Ct. 8, 2 L. Ed. 2d 61; People v. Arnold, 127 Cal. App. 2d Supp. 844, 273 P. 2d 711; Taylor v. State, 194 Miss. 1, 11 So. 2d 663, reversed on other grounds 319 U. S. 583, 63 S. Ct. 1200, 87 L. Ed. 1600; Gilbert v. Minnesota, 254 U. S. 325, 41 S. Ct. 125, 65 L. Ed. 287; State v. Holm, 139 Minn. 267, 166 N. W. 181, L. R. A. 1918 C, 304; State v. McKee, 73 Conn. 18, 46 A. 409, 49 L. R. A. 542, 84 Am. St. Rep. 124; Beauharnais v. Illinois, 72 S. Ct. 725, 343 U. S. 250, 96 L. Ed. 919; Cantwell v. Connecticut, 310

U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352; Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470, and the authorities therein cited.

[5] A contrary conclusion would not only be unthinkable, but in conflict with other sacred rights guaranteed to the individual. It was never the intention of our founding fathers that each and every person would be allowed to exercise the rights guaranteed by our constitution and Bill of Rights, or any one of them, without restraint or qualification, and in utter disregard of the equal rights of his fellow men; or that one person or class of persons could, by the exercise of a right, violate the equally important right of another with impunity. They intended, rather, to have these rights recognized and brought under the protection of the law in such a way as to permit man to function as a social being in a society where all rights, privileges, and duties are necessarily relative and mutual, and yet allow him the greatest freedom of action and thought. Thus, although the First Amendment declares, without qualification, that Congress shall make no law "abridging the freedom of speech, or of the press;" the courts have consistently maintained that this right to freely express one's opinions upon any subject whatsoever and without prior restraint can only be exercised with impunity so long as it does not infringe the co-existing and co-equal right of man to a good name and fame, which is as essential to his pursuit of happiness as is his right to life, liberty, and the peaceful possession of property. (See the authorities above cited.)

[6] The second error alleged by the defendant to have occurred during the course of his trial is levelled at the ruling of the trial judge permitting the admission in

evidence of document No. 46,339 of the Louisiana Supreme Court, despite counsel's objection it had not been identified, the signature thereon of Warren J. Moity only having been verified by the notary that witnessed his signing of the petition; further, that the offer had been prematurely made.

In overruling the objection to the admission of this document, the trial judge, in his per curiam properly disposed of the matter thusly: "The alleged defamatory statement of the defendant was made in a petition to the Supreme Court, Mr. Homer J. Hebert, a local Notary Public, had identified his signature and that of the defendant's, to the jurat accompanying the petition. The documents presented bore the certificate of the deputy clerk of the Supreme Court," certifying to the fact that the document was a correct copy of the one lodged in this court. Such legal petitions, when properly certified as being correct by the authorized court official, are admissible without further identification. R. S. 15:457. See also, R. S. 13:3711 and Articles 251 and 1394 of the CCP.

The objection of prematurity was apparently abandoned for there is no mention of this phase of the objection in the motion for a new trial in the lower court; it is not set out in the assignments of error in this court; and it was not argued here either orally or in brief.

[7] The next error allegedly committed—forming the basis of Bill of Exceptions No. 3—also lacks substance. In this bill counsel contends the trial judge improperly admitted in evidence over his objection judicial proceedings filed by Moity in the district court for Lafayette Parish against a broadcasting company and three individuals,

as well as judicial proceedings filed by him against these same three individuals in the United States District Court for the Eastern District of Louisiana, New Orleans division, two of whom were Sheriff Gerard H. Wattigny and District Attorney Knowles M. Tucker of Iberia Parish,[3] the objection being they were irrelevant and immaterial.

This contention is without merit. As pointed out by the trial judge in his per curiam to this bill, these proceedings, when considered with the petition filed in our court and the other evidence in the record, were admissible to establish that Moity had long borne ill feeling against District Attorney Tucker, and also to show that the statement contained in Article 39 forming the basis of this action had been made by Moity with malice.

The fourth bill, levelled at questions propounded to Edward Adams (the man the district attorney is charged in Article 39 with having knowingly convicted of a crime on perjured testimony) in connection with his incarceration in a jail outside of the Parish of Iberia, where the crime here charged occurred, has apparently been abandoned as it is not included as such in defense motion for a new trial nor in the assignments of error on appeal, and it was not argued in this court.

The last bill was reserved when the trial judge refused to grant the defendant a new trial, the motion therefor being predicated, in addition to the first error above disposed of, on the contention the court erred in finding him guilty since the state failed "*to prove malice and other*

[3] It is asserted these suits were subsequently dismissed by Moity because he lacked funds with which to prosecute them.

elements of the crime charged beyond every reasonable doubt." (The emphasis has been supplied.)

[8] While in this motion defendant contended his guilt had not been proved beyond "every reasonable doubt" (thus obviously conceding there was some evidence establishing his guilt, which would have the effect of removing the matter from our review inasmuch as our jurisdiction, under the provisions of Section 10 of Article VII of the Louisiana Constitution, is limited to questions of law alone), in this court, both orally and in brief, he argues the record *is totally lacking of evidence* to establish (1) the defamation was published in Iberia Parish; (2) the accused acted without probable cause in making the averment in Paragraph No. 39 of the petition for a public hearing, which forms the basis of this charge; and (3) he was actuated by malice.

[9] Our review of the record, including all of the testimony, which was attached to and made a part of this bill, unmistakably reflects there was not only some evidence to sustain the conviction and sentence of Moity, but, as pointed out by the trial judge in his written reasons for judgment and in his per curiam to this bill, it established his guilt beyond all doubt.

The opinion rendered by the trial judge is based upon the applicable statutory law, which is to the effect that for a qualified privilege to exist, requiring the state to prove actual malice motivated the publication of the defamation here involved, it must be (1) "a fair and true report of any judicial * * * proceeding;" (2) predicated upon the "reasonable belief of its truth" if made in connection with the "conduct of a person in respect to public

affairs;" and (3) made by a "party in a judicial proceeding." R. S. 14:49, the pertinent portion of which is quoted above in full in Footnote No. 2.

The published defamation, as found by the trial judge, was not only not a fair and true report, but, in fact, a false statement—one of Moity's own fabrications. He advises that "The State has produced evidence to show that Edward Adams entered a plea of guilty to a charge of simple burglary in this court on March 9, 1960, and that under this plea he was sentenced to nine years in the State Penitentiary. There was no evidence or testimony heard by the court in connection with these proceedings. The state also established that the actual prosecution of Adams was conducted by Mr. Patrick T. Caffery, an Assistant District Attorney, and that Mr. Tucker was attending a Grand Jury Session in the Parish of St. Mary on that day and was not in court."

The judge further found as a fact that Moity's statement could not be privileged or justified as a comment made in the reasonable belief of its truth for the evidence offered by him to establish this was elicited from Edward Adams, his mother, and one Oris Ardoin, who had been jointly charged with Adams, they both pleading guilty and receiving similar sentences. He states: "The substance of the testimony of these witnesses is that the mother told the defendant shortly after her son was sentenced that *the District Attorney had advised her shortly before the sentence to tell her son not to plead guilty if he was not guilty;* that she encountered her son who was being brought to court to plead and *that she so informed him.* The son *nevertheless pleaded guilty* because he said that he had been promised by *the Sheriff and one of his*

deputies that he would receive a suspended sentence if he entered a plea of guilty. The son said that he wrote a letter shortly after he was at Angola to the defendant claiming that he was innocent." (The emphasis has been supplied.)

Clearly this testimony could not form the basis for any reasonable belief on the part of Moity that the charges he made against the district attorney in his petition in this court for a public hearing were true. Moreover, as observed by the trial judge, Moity made no effort to ascertain the truth of these charges in any manner whatsoever. Although he made one or more trips to Angola to speak to Adams and others personally, had the defendant actually been interested in ascertaining the truth about the Adams conviction, he could have secured this by simply dropping by the office of the clerk of the district court in the courthouse in the town in which he lived, and there have learned with little effort that it was not Tucker who had prosecuted Adams but one of his assistants; further, that no testimony at all had been received at the trial since Adams voluntarily entered a plea of guilty.

In disposing of the contention that this published defamation was privileged because made in a judicial proceeding, the trial judge pointed out that Moity *obviously* filed in the Louisiana Supreme Court (that was clearly without jurisdiction in the matter) the lengthy petition consisting of 106 articles, and in which he recklessly, viciously, and venomously charged election fraud, collusion in the misue of public money, brutality of citizens, and lawlessness against various officials of Iberia Parish, both elected and appointed, District Attorney Tucker being one, all for the deliberate purpose of giving it wide

publicity. Moity himself, in a certificate appended thereto, asserted he had personally served copies of this petition on some fourteen named individuals, many of whom were residents of Iberia Parish. In addition, the matter received wide publicity throughout the parish through the local radio station, that had been furnished with a copy, and was discussed at length by an organization of local ministers, who were in possession of a copy too. Moity did not, by the mere filing of this petition in our court in Orleans Parish, become privileged to have it published elsewhere. Furthermore, the law does not sanction the publication of false statements maliciously, and all the more particularly when they tend to expose a person to hatred, contempt, and ridicule, as well as deprive him of the benefit of public confidence and injure him in his business or occupation.

For the reasons assigned, the conviction and sentence are affirmed.

APPENDIX 6.

L. S. A., R.S. 14:134: MALFEASANCE IN OFFICE

Malfeasance in office is committed when any public officer or public employee shall:

(1) Intentionally refuse, or fail to perform any duty lawfully required of him, as such officer or employee; or

(2) Intentionally perform any such duty in an unlawful manner; or

(3) Knowingly permit any other public officer or public employee, under his authority, to inten-

tionally refuse or fail to perform any duty lawfully required of him, or to perform any such duty in an unlawful manner.

Whoever commits the crime of malfeasance in office shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

APPENDIX 7.

La, Const. Art. 9, Sec. 1: STATE AND DISTRICT OFFICERS; GROUNDS FOR IMPEACHMENT

Section 1. All state and district officers, whether elected or appointed, shall be liable to impeachment for high crimes and misdemeanors in office, incompetency, corruption, favoritism, extortion, or oppression in office, or for gross misconduct, or habitual drunkenness.

APPENDIX 8.

La. Const. Art. 9, Sec. 2: IMPEACHMENT: TRIAL: EFFECT OF CONVICTION: OTHER PROSECUTIONS: SUSPENSION

Section 2. All impeachments shall be by the House of Representatives, and shall be tried by the Senate, whose members shall be upon oath or affirmation for that purpose, and two-thirds of the senators elected shall be necessary to convict. When the governor is on trial the chief justice or an associate justice of the Supreme Court shall preside. The Senate may sit for said purpose whether the House be in session or not, and may adjourn as it thinks

proper. Judgment of conviction in such cases shall remove and debar the accused from holding any office under the State, and shall disqualify any judge or district attorney, or attorney general from practicing law, but whether of conviction or acquittal, shall not prevent prosecution and punishment otherwise according to law. Such proceeding shall suspend any officer, except the Governor or acting Governor, and the office shall be filled by the appointing power until decision of the impeachment.

MICROCARD 22
TRADE MARK ®
PC 45 2
MATTHEW BENDER & COMPANY
MB
59-95
microcard